Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ROBERT INGRUM,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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July 23, 2009

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QUESTIONS PRESENTED

Does 28 U.S.C. §2501 – the statute of limitations governing claims asserted in the United States Court of Federal Claims – contain an implicit exception incorporating the discovery rule that permits a reasonably diligent plaintiff to bring suit within 6 years of the date of discovering his injury?

Does the "concealed or inherently unknowable" test applied by the court of appeals accurately reflect the "reasonable diligence" standard for determining whether the accrual of a claim should be suspended?

Did the court of appeals err in holding that the government's mere presence on Ingrum's remote rural property pursuant to a limited right of entry that both sides agree did not authorize the taking of the fill material put Ingrum on notice that the government might nevertheless do so?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Robert Ingrum

Defendant-Appellee and Respondent: United States of America

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PETITION FOR A WRIT OF CERTIORARI

Robert Ingrum respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, dated March 25, 2009, is officially reported at 560 F.3d 1311, and is reproduced at App. A, 1a-12a.

The Memorandum Opinion and Order of the United States Court of Federal Claims, dated April 28, 2008, is officially reported at 81 Fed. Cl. 661, and is reproduced at App. B, 13a-29a.

JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit sought to be reviewed was entered on March 25, 2009. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rules 13.1 and 13.5. On June 15, 2009, pursuant to Application No. 08A1123, The Chief Justice extended the time to file this petition to and including July 23, 2009. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant statutory provision involved is 28 U.S.C. §2501, which provides:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.
>
> A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

STATEMENT OF THE CASE

Ingrum purchased approximately 3,300 acres of rural, undeveloped land along the Texas-Mexico border near Candelaria, Texas in March 1999. Approximately 2 ¾ miles of the River Road, an unpaved portion of Highway 170, crosses the property, providing the only vehicle access to the property. At the time, the United

States Border Patrol ["USBP"] used the River Road for patrol. It has since abandoned the road to patrol by helicopter.

In 1997, prior to Ingrum purchasing the property, a portion of the River Road south of the property was washed out by heavy rains and was no longer passable. Consequently, the USBP sought and received the government's assistance in constructing a bypass around the eroded portion of the River Road. In repairing the road, the government used an unknown amount of fill material from the property, which it excavated from the side of a hill at the "gravel pit" on the property. The government completed construction of the bypass and road improvements in 1998 prior to Ingrum purchasing the property.

During the summer of 1998, heavy rains again eroded portions of the River Road, and the government returned in early 1999 to perform additional repairs. On March 13, 1999, just days before closing on the property, Ingrum signed a "Military Construction, Training and Operations Right-of-Entry Permit" ["Right of Entry"] authorizing the government to enter the property and make improvements to the River Road. The Right of Entry stated:

> The undersigned, hereinafter called the "Owner" hereby grants to the UNITED STATES OF AMERICA, hereinafter called the "Government", a right-of-entry permit upon the following terms and conditions:

> 1. The Owner hereby grants to the Government the right to enter upon the lands hereinafter described ("the land") at any time within the following period: February 1, 1999 through December 31, 1999, in order to carry out military training and operations on said lands by the Government.
>
> a. The purpose of the work is for military training and operations.
>
> b. Construction in connection with the use of this site will include: Re-construct and improvement of Presidio County River Road from Candelaria, Texas to Chispa Road Intersection. Restoration of the areas involved in the construction is not required and is waived by the Owner.
>
> ....
>
> 4. The Government agrees to be responsible for damages arising from the activity of the Government, its officers, employees, or representatives on said land ...

The Right of Entry also contained a provision stating:

> The Owner (does/does not) grant the Government the right to use any buildings, timber or any other products of the land.

Ingrum did not mark either the "does" or "does not" option on the form. The government admits that Ingrum's failure to affirmatively grant permission to

use products of the land in making the repairs means that Ingrum "did not grant the government the right to use any materials from his land."

From March to April 1999, the government repaired portions of the River Road - regrading the road, installing cement culverts over dry creek beds and constructing cement road segments in low-lying areas. To do so, it again used an unknown quantum of fill material excavated from the gravel pit on the property. The removal of fill material from the gravel pit left a bowl-like formation on the property approximately 35,000 square feet in area and 20 feet in height. The gravel pit was located at the approximate halfway point of the 2 ¾ mile stretch of the River Road traversing the property and was visible from the portion of the River Road on the property. The repairs were completed in April, 1999.

During the five years after the government completed the 1999 repairs to the River Road, Ingrum made the ten-hour drive from Austin, Texas on five or six occasions and attempted to enter the property via the southern portion of the River Road only to find that the road was impassable due to flooding caused by the government's defective construction work. In addition to his trips to the remote area, Ingrum also spoke with USBP agents on numerous occasions during that time to determine if the road to his property was passable. Although Ingrum was informed on some occasions that the road was passable, that occurred at times that it was not convenient for Ingrum to make the 10-hour drive to his property.

In May 2004, following another trip to the area to attempt to drive to his property, Ingrum was informed of the existence of the gravel pit for the first time as a result of a chance encounter with a migrant worker named "Lupe" on the street in Candelaria. Lupe, who had trespassed on Ingrum's property to gain access to the Rio Grande River, informed him that "those guys that worked on the road sure took a lot of material" from "the big gravel pit that they dug back in there." In January or February of 2005, Ingrum was able to enter the property and saw the gravel pit for the first time.

On August 2, 2006, Ingrum filed his first complaint with the United States Court for Federal Claims seeking compensation for the government's taking, but dismissed that action voluntarily. Ingrum initiated his second takings claim lawsuit on January 9, 2007, the proceeding from which this petition arises. The government moved to dismiss the action as untimely filed under 28 U.S.C. § 2501. On June 26, 2007, the trial court denied the government's motion to dismiss without prejudice, concluding that the record was not sufficiently developed on the issue of when Ingrum first should have known that the fill material was removed from his property. *Ingrum v. United States*, 77 Fed.Cl. 248 (2007). After conducting discovery, the government filed a renewed motion to dismiss on January 25, 2008, again claiming that this action was time-barred. The trial court granted the government's motion and entered its order dismissing Ingrum's claims as time-barred on April 28, 2008. *Ingrum v. United States*, 81 Fed. Cl. 661 (2008).

The United States Court of Appeals for the Federal Circuit affirmed the dismissal on March 25, 2009. In affirming, the court of appeals explained that the accrual of Ingrum's claims could be suspended in only two circumstances: (1) if the United States concealed its acts with the result that Ingrum was unaware of their existence; or (2) the injury was "inherently unknowable" at the time that the cause of action accrued. Because Ingrum does not assert that the United States concealed its acts, the court of appeals focused on whether the injury to Ingrum's property was inherently unknowable. The court of appeals concluded that the "facts underlying Mr. Ingrum's claim were not inherently unknowable because the government's excavation of the fill material was an open and notorious activity conducted on the property, and because Ingrum was on notice of the government's repair activities and of the possibility that the government would use fill material from his property in the course of those activities." *Ingrum,* 560 F.3d at 1315.

REASONS FOR GRANTING THE WRIT

In 1949, this Court adopted the discovery rule where the plaintiff's injury was "unknown and inherently unknowable", holding that his "blameless ignorance" of his injuries warranted suspending the accrual of his cause of action. *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949). Thirty years later, this Court reaffirmed the rule adopted in *Urie*, but also clarified it, explaining that the plaintiff's ignorance of his or her legal rights arising from the injuries do not suspend accrual of the cause of action. *See United States v. Kubrick,* 444 U.S. 111, 122 (1979). Now, another thirty years later, it is again time for this Court to clarify the standards governing the discovery rule and the suspension of the accrual of a claim where the victim is blamelessly ignorant.

Because both *Urie* and *Kubrick* involved medical injuries, this Court has never addressed whether, and under what conditions, the discovery rule's accrual suspension is appropriate in other circumstances where the underlying statute of limitations is silent. This case, involving the government's taking of fill material for road repairs being completed on Ingrum's remote property, provides this Court with a proper vehicle for doing so. This Court should resolve any doubt as to the applicability of the discovery rule by reaffirming its holdings in *Urie* and *Kubrick* and by holding that the discovery rule applies equally to other types of injuries and other statutes of limitations that are otherwise silent where the victim acts with reasonable diligence upon being put on notice of the possibility that an injury has occurred from which

legal claims arise. This Court should also hold that, in the context of this case and other cases involving government access to land, the government's mere presence, without some additional indication, does not put the landowner on notice of possible injury.

I. This Court should clarify that the discovery rule applies to claims governed by 28 U.S.C. §2501.

Although this Court has never addressed the issue, the court of appeals assumes that section 2501 incorporates a discovery rule. *See Ingrum*, 560 F.3d at 1314-15. Although some doubt has been expressed, this Court's jurisprudence encourages the court to make such an assumption.

In *Rotella v. Wood*, 528 U.S. 549 (2000), this Court noted that "[f]ederal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue, as civil RICO is here." *Id.* at 555; *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered."); *Urie*, 337 U.S. at 169 (holding that limitations period under Federal Employers' Liability Act incorporated discovery rule and that cause accrued when accumulated effects of deleterious substances manifest themselves); *Kubrick*, 444 U.S. at 122 (holding that Federal Tort Claims Act incorporated discovery rule into its statute of limitations).

While the above cases demonstrate an acceptance of the discovery rule, this Court has also given limited indications that the discovery rule should not be universally assumed to be incorporated into the various federal statutes of limitations. In *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001), this Court expressly declined to decide whether "all federal statutes of limitations, regardless of context, incorporate a general discovery rule 'unless Congress has expressly legislated otherwise.'" *See id.* at 22. This Court further explained that its earlier decision in *Holmberg* did not "establish a general presumption [that the discovery rule was] applicable across all contexts", noting that "[t]he only other cases in which we have recognized a prevailing discovery rule, moreover, were decided in two contexts, latent disease and medical malpractice, 'where the cry for [such a] rule is loudest.'" *See id.* (citations omitted). Finally, noting that "lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue', this Court noted that it has 'not adopted that position as our own.'" *Id.* In his concurring opinion, Justice Scalia (joined by Justice Thomas) states his view that federal statutes of limitations do not contain an implicit discovery rule. *See id.* at 35-36 (Scalia, J., concurring).

This Court's recognition of the widespread assumption that the discovery rule is implied in federal statutes of limitations, while simultaneously and expressly withholding its position on the issue, leaves the lower courts to continue their journey through a legal landscape shrouded in fog, lacking the guideposts that would be provided by a clear decision recognizing that the discovery rule is implicitly

contained in federal statutes of limitations that are otherwise silent (such as section 2501) and clarifying the standards for determining when it should be applied to suspend accrual of the claim.

II. The accrual suspension test applied by the court of appeals is not equivalent to the traditional discovery rule applied by this Court to other limitations statutes.

In its opinion, the court of appeals asserts that its statement of the "accrual suspension rule" is the same as the due diligence discovery rule recognized by this Court in the contexts addressed above. However, a cursory reading of the court's opinion demonstrates that its assertion is wrong.

The court of appeals explains that the accrual suspension rule applies where: (1) the defendant conceals his acts and the plaintiff is thus unaware of their existence; or (2) the plaintiff's injury was inherently unknowable at the time the cause of action would otherwise have accrued. *See Ingrum*, 560 F.3d at 1315. The court then explains that the rule is sometimes stated as suspending the accrual of the claim until the plaintiff knew or should have known that the claim existed. *See id.* at 1315 n.1. It then concludes that the "concealed or inherently unknowable" formulation is the preferable standard for accrual suspension cases. *See id.*

The suspension of the accrual of a claim where the defendant has affirmatively concealed his wrongdoing is an equitable estoppel position adopted by courts to

prevent wrongdoers from benefiting from their malfeasance. *See Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 347-49 (1874). By comparison, the discovery rule does not focus on the defendant's conduct. It instead focuses on the plaintiff's conduct and whether he was reasonably diligent in investigating the possibility that he might have a claim. Other than achieving the same effect of suspending accrual of the claim, the doctrines have little in common. The court of appeals is wrong to the extent that it asserts that the "concealed" part of its formulation of the accrual suspension doctrine is simply an alternative formulation of the discovery rule.

As for the inherently unknowable formulation of the standard, that too bears little resemblance to the due diligence discovery rule beyond achieving the same effect. Moreover, the inherently unknowable standard, while long-established, is not helpful to courts trying to determine whether the accrual of the claim should be suspended.

The inherently unknowable test appears to have its genesis in a treatise by Professor Williston in which he used the term while explaining when a claim accrued involving a warranty as to a future performance of a fruit tree. Only when the fruit tree bore fruit was the separate warranty as to the performance of the tree breached. Prior to the tree bearing fruit, the breach was inherently unknowable. Putting aside for the moment whether the type of tree was indeed inherently unknowable, the general position taken by Professor Williston is sound, as a warranty as to future performance should not be breached, and the claim

accrue, until the time for that future performance arrives and the performance is deficient. While knowledge of the likelihood, or certainty, that the breach will occur is certainly worth having, the breach nevertheless occurs at the time of that future performance. Professor Williston used the inherently unknowable standard to justify his conclusion that the breach occurred not at the time of the sale but at the later time of the future performance, a conclusion based in part on the fairness of delaying the accrual of the claim until a time that the victim is aware of the injury. While there might be some intellectual overlap between the inherently unknowable standard and the due diligence discovery rule, the discovery rule is better suited to determining whether the accrual of a claim should be suspended.

The problem with applying Professor Williston's example to the accrual of claims is that the extent to which something is inherently unknowable is limited only by the individual's resources and the state of technology at any given moment. Assuming that the technology is available, such as DNA testing for Professor Williston's fruit tree or extensive medical testing for an individual, then the only limit on the ascertainable knowledge is the individual's ability to procure the technology. Should a party have known that the tree would bear apples instead of pears simply because a botanist with a good laboratory could make that determination? Should a plaintiff know of his deteriorating lungs before he feels it because an MRI would disclose the developing condition? Ultimately, the inherently unknowable test cannot be applied consistently to all litigants and in all situations. As a

result, it is not a sound test for determining when the accrual of a claim should be suspended.

The better test for determining whether to suspend the accrual of a claim is the traditional due diligence discovery rule. The plaintiff is held to the standard of the reasonable person, a standard well established in American law. While the due diligence standard overlaps the inherently undiscoverable standard to some extent, it cannot be stretched beyond all bounds of common sense because reasonableness is its cornerstone principle. Rather than requiring every plaintiff to retain a botanist and lab to test every tree or to continually undergo invasive medical procedures to identify developing conditions, the due diligence standard would only require the plaintiff to do so where there was some reason to suspect that the trees delivered would not bear the fruit as advertised or that their health was compromised. Grounding the accrual suspension doctrine in reasonableness brings it in line with the overriding principle of our jurisprudence. Moreover, because the standard is far more familiar to litigants and courts, the predictability of outcomes is increased and litigants can act accordingly.

III. The court of appeals' analysis eliminated reasonableness as the controlling standard for determining whether the accrual suspension doctrine applied to Ingrum's claims.

The court of appeals concluded that the injury to Ingrum's property was not inherently unknowable because the government's excavation of the pit was

open and notorious and Ingrum had notice that the government had entered his property, even if the entry was pursuant to a limited right that both parties agree did not include any right to take fill material from his property. If those facts establish that Ingrum should have known that his property was threatened by the government's conduct, then the "diligent landowner" standard has been stripped of any consideration of reasonableness. The court of appeals' analysis cannot be an accurate reflection of the law. This Court should use this opportunity to reaffirm the prominence of the reasonableness standard. If all that is required to put the landowner on notice of inquiry is the presence of the government on any part of the property, and the resulting obligation of inquiry is to spare neither expense nor hardship, then reasonableness has given way to the outer limits of the realms of possibility and paranoia. Such a standard does not strike a fair balance between requiring that the owners be diligent and assert claims in a timely fashion and protecting their right to seek compensation in federal courts where the government takes their property.

The court of appeals held that Ingrum was deemed to have been on inquiry as to potential harm because he signed an authorization giving the government permission to repair the road running through his property. The government's presence on Ingrum's approximately 3,300 acres of land was expressly limited to the approximately 2 ¾ miles of roadway that it was authorized to repair, and both Ingrum and the government understood that the government had no right to use materials from another area of the property. Putting Ingrum on inquiry as a matter of

law that the government might take materials from other areas of his land under these circumstances defies logic and encourages mistrust of our government. Effectively, the court of appeals has held that the mere presence of the government on land necessarily puts the owner on notice of possible damage. A landowner should be able to rely upon the limitations created by the authorization. Where the government, not the landowner is the wrongdoer, the burden, and the potential for a loss of rights, is being placed on the wrong entity.

Instead of deeming Ingrum to be on inquiry based on the government's mere presence on the property, the court of appeals should have focused on whether he acted reasonably under the circumstances in which he found himself. The record establishes that he did. Despite the property being more than 10 hours away from his residence, Ingrum attempted to visit it several times in the years following the government's repair work. In the five or six times that he tried to access the property from the south during the relevant time period, the road was inaccessible due to flooding. The court of appeals notes that Ingrum was told "several times" during the six-year period that the road was accessible but he did not immediately set out on the trip to visit his land. It should not be unreasonable for a landowner to refrain from setting out on a many hour drive to visit property where the landowner has no reason to believe that there has been any damage to the property.

The court of appeals also notes that the property was accessible from the north. However, Ingrum

testified that the one time he tried that route, he had to turn back because the "long, hard drive" in a four-wheel drive vehicle at approximately 10 miles per hour because the "road is so rough" was too much. That "road" is so bad that the United States Border Patrol even stopped performing surveillance by land vehicle, relying on helicopters instead. While the road might have been "passable" in the theoretical sense, as Ingrum acknowledged, he simply could not do it. How can it be unreasonable for Ingrum to turn back from roads that the government itself chooses not to use when there has been no indication that he needed to press forward and inspect his property?

Had there been any legitimate reason for Ingrum to suspect that the government might have harmed his land, then it might be reasonable to require him to either hike onto the land from the south or endure the trip by vehicle from the north. But no such circumstances existed here. The government's access was expressly limited to the road that it had permission to repair. The government itself admitted that it knew it did not have permission to take the fill material under the authorization granted by Ingrum to fix the road. There was no reason for Ingrum to inquire as to the government's activities. This is a far different situation from those presented in the case law cited by the court of appeals. There were no documents indicating damage to the property, as in *Catellus Development Corp. v. United States,* 31 Fed. Cl. 399 (1994). *See id.* at 407-408. There was no readily observable activity that the landowner actually observed or was widely publicized, as in *Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864 (1981),

and *LaFont v. United States*, 17 Cl. Ct. 837 (1989). This was a small operation on isolated land that was represented to be limited in scope to the repair of a road, without removal of materials from the property.

Collectively, the above cited cases identify the following factors to be considered in determining whether the property owner, in being reasonably diligent, should inquire as to the threat of harm to his property:

1. whether the property owner was put on notice as to the government's activities on the property either because the activities were open and notorious and the owner was aware of them (such as the canal being built over the mineral interests at issue or the dredging occurring next to the damaged oyster beds and depositing the dredged silt on those lands as it occurred) or there were public records disclosing the activities of which the owner is charged with notice (such as the government's condemnation proceeding);

2. whether the harm complained of was a foreseeable result of the government's activities; and

3. whether the property owner made any effort to remain informed of the conditions on his property (such as visiting or attempting to visit the property).

Here, the above factors favor suspending the accrual of Ingrum's takings claim until he was informed of the taking in May 2004. The only notice that Ingrum had of the government's activities on his property was the right of entry that he granted for the limited purpose of repairing the road. The signed document did not permit the government to take fill materials from the property, although it easily could have. As a result, Ingrum was reasonable in assuming that no fill material would be taken from his property and the taking of the fill was not foreseeable. Ingrum should not be held to have a duty to observe to ensure that the government does not overstep the permission expressly granted by him. Finally, Ingrum's diligence regarding his efforts to remain abreast of the conditions on his property is readily established by his several trips to the area to visit the land, only to be denied access by the government's poor workmanship that rendered the road useless.

The mere fact that there is some means by which Ingrum could have accessed his property and discovered the quarried fill material should not require him to undertake any such endeavor. Under the court of appeals' holding, the harm could have been discovered even if Ingrum was required to walk the entire distance from his home in Austin (or even New York) to his property in Candelaria, Texas. Holding him to such a burden where there was no reason for him to suspect that such a taking had occurred effectively eliminates reasonableness as the guiding consideration and sets aside longstanding law. The trial court's judgment should be reversed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Case No. 2008-5085

[March 25, 2009]

ROBERT INGRUM,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 07-CV-012, Judge Mary Ellen Coster Williams.

OPINION

Before RADER, BRYSON, and MOORE, Circuit Judges.

BRYSON, Circuit Judge.

Robert Ingrum filed an action seeking just compensation for the government's removal of fill

material from a hillside on his property. The Court of Federal Claims dismissed the action as time-barred under the applicable six-year statute of limitations. We affirm.

I

On March 16, 1999, Mr. Ingrum purchased approximately 3,300 acres of undeveloped land along the Mexican border near the small town of Candelaria, Texas. He paid $98,000 for the property. An unpaved road, known as "the River Road," provides the only vehicular access to the property. The paved highway that connects with the River Road ends in Candelaria, about four miles from the edge of Mr. Ingrum's property. The River Road crosses his property for about 2.75 miles and then continues northward along the Rio Grande. The property can be accessed by road from both the north and the south, although access from the north involves traversing a much longer stretch of unimproved road.

In 1997, heavy rainfall eroded a portion of the River Road south of the property. A task force from the Department of Defense built a bypass around the washed-out stretch of road and made additional improvements to the road. Those repairs were completed in 1998, prior to Mr. Ingrum's purchase of the property. To perform those repairs, the task force used fill material that it had excavated, with the permission of the previous landowner, from the side of a hill near a gravel pit on the property. Rainfall during the summer of 1998 again washed out portions of the road, including some of the roadwork that was completed earlier that year. The task force therefore returned to perform additional repairs. Before the

government performed those repairs, Mr. Ingrum signed a "Right of Entry" permit authorizing the government to enter the property to repair the road and to carry out military training and other operations on the land. Mr. Ingrum signed that permit on March 13, 1999, shortly before closing on the property. The Right of Entry permit also contained a provision that stated: "The Owner (does/does not) grant the Government the right to use any buildings, timber or any other products of the land." Mr. Ingrum did not select either the "does" or "does not" option when executing the permit; instead, that portion of the form was left blank.

From March through April 1999, the government repaired the road by regrading it in some places, installing concrete culverts, and laying concrete slabs in flood-prone areas. To conduct those repairs, the government again excavated fill material from the same hillside borrow pit on Mr. Ingrum's property. The removal of the fill material left a "bowl-like formation" on the hillside that was plainly visible from the portion of the River Road that crossed the property. Mr. Ingrum estimated that the excavated area was roughly 200 feet across.

Prior to purchasing the property, Mr. Ingrum had accessed it from the south on numerous occasions. Approaching from that direction, the trip to the property was a 12-hour drive from Mr. Ingrum's residence in Austin, Texas. Although Mr. Ingrum attempted to make that drive several times after the government completed its repairs of the road in April 1999, he was unable to drive onto the property on those occasions because flooding had rendered portions of the River Road south of the property impassable.

Mr. Ingrum was aware that the River Road was passable from the north, but he chose not to access his property from that direction because doing so "would have required an additional 7-9 hours of driving" along rough, unpaved roads, which he regarded as "an untenable option."

Several times between 1999 and 2004, Mr. Ingrum spoke by telephone with a Border Patrol agent in order to determine the condition of the River Road; the agent reported on several occasions that the road was passable from the south. Mr. Ingrum did not attempt to access his property on those occasions, however, because those were all times when it was not convenient for him to make the drive.

Because Mr. Ingrum did not visit his property between April 1999 and 2005, he did not learn about the hillside borrow pit until he happened to encounter a migrant worker in Candelaria in May 2004. The worker, who had crossed Mr. Ingrum's property in order to gain access to the Rio Grande, told Mr. Ingrum about the pit and commented that the government construction workers "took a lot of material" from the hillside. Some eight or nine months later, Mr. Ingrum visited his property and saw the borrow pit for the first time.

On August 2, 2006, another 18 months after seeing the borrow pit, Mr. Ingrum filed a takings claim against the United States in the Court of Federal Claims. He sought $324,000 in compensation for the taking of the fill material that was used for the 1999 road repairs. Although that figure was more than three times the price that Mr. Ingrum had paid for the entire 3300-acre property in 1999, Mr. Ingrum

justified the amount as an estimate of what it would have cost the government to purchase and transport from the nearest gravel pit enough material to rebuild seven miles of road. After dismissing his suit voluntarily to cure an unrelated jurisdictional defect, Mr. Ingrum filed another complaint in the Court of Federal Claims on January 9, 2007.

The government sought dismissal of the action as time-barred under the six-year statute of limitations for actions falling within the jurisdiction of the Court of Federal Claims. Mr. Ingrum argued that his claim did not accrue at the time the fill material was taken in March and April 1999, because he was unaware of the taking and had no reason to be aware of it until he learned about the borrow pit in May 2004. He contended that he was not chargeable with knowledge of the taking because he lived far from the property, he had been unable to access the property from the south on several occasions because of poor road conditions, and the Right of Entry permit had not given him notice that the government intended to take material from his land. For those reasons, he argued that his takings claim accrued only when he first learned of the alleged taking in 2004. Accordingly, he contended that his suit, which was filed in 2006, was filed within the six-year limitations period.

The Court of Federal Claims ruled that because the actions giving rise to the takings claim were not inherently unknowable, Mr. Ingrum's claim accrued in April 1999 when the government completed its repair work. Ingrum v. United States, 81 Fed. Cl. 661 (2008). Accordingly, the court dismissed Mr. Ingrum's action as time-barred under the applicable statute of limitations. Mr. Ingrum now appeals to this court.

II

A claim falling within the jurisdiction of the Court of Federal Claims must be brought within six years of the date that the cause of action accrued. 28 U.S.C. § 2501. A claim first accrues when all the events have occurred that fix the alleged liability of the government and entitle the claimant to institute an action. Therefore, a claim alleging a Fifth Amendment taking accrues when the act that constitutes the taking occurs. Alliance of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

The parties in this case agree that the alleged taking occurred no later than April 1999, when the government task force removed the fill material from the hillside on Mr. Ingrum's property. That accrual date would place Mr. Ingrum's suit, which he first filed on August 2, 2006, outside the six-year limitations period. Mr. Ingrum therefore seeks the benefit of the "accrual suspension" rule. Under that rule, the accrual of a claim against the United States will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim. Japanese War Notes Claimants Ass'n v. United States, 178 Ct. Cl. 630, 373 F.2d 356, 358-59 (1967). However, a plaintiff's ignorance of a claim that he should have been aware of is not enough to suspend the accrual of a claim. Id. at 359; see Braude v. United States, 218 Ct. Cl. 270, 274, 585 F.2d 1049 (1978). The accrual suspension rule is "strictly and narrowly applied," and the accrual date of a cause of action will be suspended in only two circumstances: "[the plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was

unaware of their existence or it must show that its injury was 'inherently unknowable'" at the time the cause of action accrued. Martinez v. United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc), quoting Welcker v. United States, 752 F.2d 1577, 1580 (Fed. Cir. 1985); Alliance of Descendants of Tex. Land Grants, 37 F.3d at 1482; Catawba Indian Tribe v. United States, 982 F.2d 1564, 1571-72 (Fed. Cir. 1993); Japanese War Notes Claimants Ass'n, 373 F.2d at 359.[1]

Mr. Ingrum does not contend that the government concealed its actions. His sole argument is that his action is not time-barred because the alleged taking was inherently unknowable as of the accrual date. We conclude that the facts underlying Mr. Ingrum's claim were not inherently unknowable because the government's excavation of the fill material was an open and notorious activity conducted on his property, and because Mr. Ingrum was on notice of the government's repair activities and of the possibility that the government would use fill from his property in the course of those activities.

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[1] It is sometimes stated that accrual of a claim against the United States will be suspended until the claimant "knew or should have known" that the claim existed. See Kinsey v. United States, 852 F.2d 556, 557 n.* (Fed. Cir. 1988). That articulation of the rule is not meant to set forth a different test, as the two standards have been used interchangeably. See Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008); Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988). However, the "concealed or inherently unknowable" formulation, which the trial court used in this case, is both more common and more precise, and we therefore continue to endorse that formulation as the preferable one for "accrual suspension" cases. See Martinez v. United States, 333 F.3d at 1319.

The line of "accrual suspension" cases dealing with takings claims has established that "[w]here the actions of the government are open and notorious ... [the] plaintiff is on inquiry as to its possible injury," and the statute of limitations begins to run. Coastal Petroleum Co. v. United States, 228 Ct. Cl. 864, 867 (1981). In Coastal Petroleum, the plaintiff sought just compensation more than six years after the government used, and prevented access to, the plaintiff's limestone in order to construct a canal in Florida. Because the canal project was widely reported in the state news media, and because the plaintiff had admitted that it was aware of the project, the court concluded that the government's actions were open and notorious and that the plaintiff was therefore "on inquiry as to the threat to its property rights." Id.

The Court of Federal Claims applied the same principle in Catellus Development Corp. v. United States, 31 Fed. Cl. 399 (1994), in which a landowner brought a takings claim against the government for mistakenly shelling his remote property during artillery exercises and allegedly contaminating his land with unexploded ordnance. The court concluded that the bombing exercises were open and notorious acts that placed the landowner on inquiry that it had a possible claim, thus triggering the limitations period. Id. at 408 n.8; see also Voisin v. United States, 80 Fed. Cl. 164, 176 (2008) (construction of houses on disputed property was "clearly an open and notorious activity" putting plaintiffs on notice of the government's actions); Jakoby v. United States, 38 Fed. Cl. 192, 195 (1997) (absence of roadway or passage to plaintiff's property was "open and notorious" condition precluding tolling of limitations period); LaFont v. United States, 17 Cl. Ct. 837, 842 (1989) (government

dredging operation that allegedly damaged plaintiff's oyster beds was "an obvious act" that set the accrual date for plaintiff's takings claim); cf. Dahl v. United States, 319 F.3d 1226, 1229 (10th Cir. 2003) (accrual of Federal Tort Claims Act claim not suspended under "discovery rule" because destruction of 30-foot high stockpile of mineral ore was a "manifest injury" that would have been obvious upon inspection).[2]

These authorities stand for the principle, which we reaffirm, that a landowner will be deemed to be on inquiry of activities that are openly conducted on his property. Applying that principle to this case, it is apparent that the government's use of the fill material from Mr. Ingrum's property was an open and notorious act that put him on inquiry that he had a potential claim. By Mr. Ingrum's own estimation, the borrow pit created by the government's use of the fill material had a footprint of roughly 35,000 square feet. Mr. Ingrum concedes that if he had visited his property after the government performed the 1999 repairs, he would have discovered the pit because it was "in plain sight" and clearly visible from the road. Under those circumstances, the government's actions cannot fairly be described as inherently unknowable.

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[2] The concept of an "open and notorious" condition has been applied most frequently in the law of adverse possession, where it plays a similar role. See William B. Stoebuck & Dale A. Whitman, The Law of Property 856 (2000) (" 'Open and notorious' possession usually means possession that gives visible evidence to one on the surface of the possessed land. The purpose of this element is to afford the owner opportunity for notice. He need not actually have seen the evidence, but is charged with seeing what reasonable inspection would disclose.").

Furthermore, like the plaintiff in Coastal Petroleum, Mr. Ingrum was aware of the construction on his property. Indeed, Mr. Ingrum signed the Right of Entry permit explicitly authorizing the government task force to enter his property in order to reconstruct portions of the River Road on and near that property. Because Mr. Ingrum knew of the construction activities, he was on inquiry that he had a potential takings claim. See Coastal Petroleum, 228 Ct. Cl. at 867; see also Fallini v. United States, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("[A] plaintiff does not have to possess actual knowledge of all the relevant facts in order for a cause of action to accrue.").

Mr. Ingrum argues that although the Right of Entry permit provided notice of the government's construction activities on his land, it did not give him any reason to suspect that the government would use fill material from his property in the course of those activities. In support of that contention, Mr. Ingrum relies on the fact that the Right of Entry permit included a provision that would have expressly authorized the government to use "buildings, timber or any other products of the land," yet he did not indicate on the permit whether he "does" or "does not" so authorize the government. Thus, Mr. Ingrum argues, it was reasonable for him to assume that the government would not take any material from his property.

In fact, the provision in the Right of Entry permit addressing the government's authorization to use products from the land cuts the other way: Its very presence put Mr. Ingrum on notice that the government contemplated that the repairs would necessitate the use of material from Mr. Ingrum's

property, regardless of whether he affirmatively granted that permission. The question whether Mr. Ingrum granted the government permission to use material from his property goes to the merits of his takings claim; it does not negate the fact that the authorization provision put Mr. Ingrum on notice that the government might need to use fill material from the property. Although Mr. Ingrum could not be sure that the government would do so (and may have hoped that it would not), he clearly knew enough at the time the government completed its repairs to make an inquiry and discover the facts underlying his takings claim. See Menominee Tribe of Indians v. United States, 726 F.2d 718, 721 (Fed. Cir. 1984). Having failed to make such an inquiry, Mr. Ingrum cannot now avail himself of the accrual suspension rule.

Finally, Mr. Ingrum argues that it would be unreasonable to expect him to have discovered the government's alleged taking any earlier. He notes that his property is located several hundred miles from his residence in Austin; that he tried to access his property via the southern route several times, but was thwarted by poor road conditions; that the occasions on which he knew that the River Road was passable from the south were all times that were inconvenient for him to visit; and that it would have taken an additional 7-9 hours of driving on rough terrain to access his property from the north. We are not persuaded that those circumstances satisfy the strict standard of showing that the government's action was "inherently unknowable." As discussed above, a landowner is on inquiry as to open and notorious activities conducted on his property. That principle applies regardless of how far the landowner resides from the disputed property. Thus, it is immaterial

whether Mr. Ingrum lived in Austin or New York City, as opposed to some closer location such as Candelaria, or that it would have taken him longer to access his property via the passable northern route. "It is fair to charge a property owner with knowledge of what happens on his land," so long as those activities are open and notorious. See Catellus, 31 Fed. Cl. at 408; see also Entines v. United States, 39 Fed. Cl. 673, 680 (1997) ("It is important to remember that tolling is not appropriate for claims that are simply burdensome or inconvenient to discover."). As the trial court correctly observed in this case, "A property owner is charged with knowledge of what happens on his property even if the land is remote and difficult to access." 81 Fed. Cl. at 667. Because we agree with the trial court that Mr. Ingrum's claim was not inherently unknowable when the alleged taking occurred in April 1999, we uphold the court's decision dismissing his claim as time-barred.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 07-12L

[April 28, 2008]

Robert INGRUM,

Plaintiff,

v.

The UNITED STATES,

Defendant.

John C. Carsey, Minton, Burton, Foster & Collins, P.C., Austin, Texas, for Plaintiff.

Bruce K. Trauben, U.S. Department of Justice, Washington, D.C., for Defendant.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S RENEWED MOTION TO DISMISS

WILLIAMS, Judge.

Plaintiff, Robert Ingrum, brings this takings suit under the Fifth Amendment to the Constitution seeking $324,000 in compensation for the Government's removal of fill material from his property. This matter comes before the Court on Defendant's motion to dismiss the action as time-barred under the six-year statute of limitations in 28 U.S.C. § 2501.

The alleged taking resulted in a 20-foot high, 35,000 square-foot pit on Plaintiff's undeveloped 3,300 acre property in rural Texas. The parties agree for purposes of this motion that the fill was removed in April 1999. Plaintiff claims that his cause of action did not accrue until he was informed of the taking in 2004, because the pit was "inherently unknowable," as he lived some 550 miles away from the property, and frequent flooding either prevented him from accessing the property or rendered his journey prohibitively lengthy, arduous and inconvenient. Because Defendant's alleged taking of fill material from Plaintiff's property was open and notorious and discoverable by Plaintiff through the exercise of reasonable diligence, Plaintiff should have known of the taking when it occurred. As such, Plaintiff's claim accrued in April 1999, and this action, filed more than six years later, is time-barred.

Background[1]

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[1] This background is derived from the Complaint, the affidavit of Robert Ingrum dated April 20, 2007, the December 10, 2007 deposition of Robert Ingrum, and exhibits to the parties' motion papers.

Plaintiff is the owner of approximately 3,300 acres of rural, undeveloped land near Candelaria, Texas which he purchased for $98,000 on March 16, 1999. Running across this property and that of several adjacent landowners is an unpaved portion of Highway 170 known as the "River Road." The River Road is patrolled frequently by the United States Border Patrol (USBP) to interdict illegal immigrants and drug smugglers entering the United States from Mexico. Approximately 2 3/4 miles of the River Road crosses the property, and this portion of the road provides the only vehicle access to the property. The property can be accessed from both the north and the south via the River Road.

In 1997, a portion of the River Road south of the property was washed out by heavy rains and was no longer passable. Consequently, the USBP sought and received the assistance of a Department of Defense Joint Task Force 6 (JTF-6), to construct a bypass around the eroded portion of the River Road.[2] To construct the bypass and to make additional improvements to the road, JTF6 used an unknown quantum of fill material from the property. The fill was excavated by JTF-6 from the side of a hill at the "gravel pit" on the property. JTF-6 completed construction of the bypass and road improvements in 1998 prior to Plaintiff's purchase of the Candelaria property.

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[2] JTF-6 is a Department of Defense Task Force comprised of personnel from the Army and the Marine Corps. Def.'s Renewed Mot. to Dismiss at 5 n. 7.

During the summer of 1998, heavy rains again eroded portions of the River Road, and JTF-6 returned in early 1999 to perform additional repairs. On March, 13, 1999, just days before closing on the property, Plaintiff signed a "Military Construction, Training and Operations Right-of-Entry Permit" (Right of Entry) authorizing JTF-6 to enter the property and make improvements to the River Road. The Right of Entry stated:

The undersigned, hereinafter called the "Owner" hereby grants to the UNITED STATES OF AMERICA, hereinafter called the "Government", a right-of-entry permit upon the following terms and conditions:

1. The Owner hereby grants to the Government the right to enter upon the lands hereinafter described ("the land") at any time within the following period: *February 1, 1999* through *December 31, 1999*, in order to carry out military training and operations on said lands by the Government.

a. The purpose of the work is for military training and operations.

b. Construction in connection with the use of this site will include: *Re-construct and improvement of Presidio County River Road from Candelaria, Texas to Chispa Road Intersection*. Restoration of the areas involved in the construction is not required and is waived by the Owner.

The use of military equipment, including tracked and wheeled vehicles, aircraft, aircraft flights, and/or landings in and over this land may be

> involved as a part of this military training operation.
>
> ....
>
> 4. The Government agrees to be responsible for damages arising from the activity of the Government, its officers, employees, or representatives on said land ...

Def.'s Renewed Mot. to Dismiss Ex. 9F at 1-2. The Right of Entry also contained a provision stating "The Owner (does/does not) grant the Government the right to use any buildings, timber or any other products of the land," but Plaintiff did not mark either the "does" or "does not" option on the form. *Id.* at 2. According to a memorandum dated August 31, 2004, Colonel Paul R. Disney of the United States Army interpreted this to mean that Plaintiff "did not grant the government the right to use any materials from his land." Pl.'s Resp. Ex. 1 at 2.

From March to April 1999, JTF-6 repaired portions of the River Road-regrading the road, installing cement culverts over dry creek beds and constructing cement road segments in low-lying areas. To execute these repairs, JTF-6 again used an unknown quantum of fill material excavated from a hillside at the gravel pit on Plaintiff's property. The repairs were completed in April, 1999.

The removal of fill material from the gravel pit left a bowl-like formation on the property approximately 35,000 square feet in area and 20 feet in height. The gravel pit was located at the approximate halfway point of the 2 3/4 mile stretch of the River Road

traversing the property and was visible from the portion of the River Road on the property. Tr. (Apr. 2, 2008) at 26-27; Def.'s Renewed Mot. to Dismiss Ex. 9H at US00992.

During the five years after JTF-6 completed the 1999 repairs to the River Road, Plaintiff made the ten-hour drive from Austin, Texas, on five or six occasions and attempted to enter the property via the southern portion of the River Road only to find that the road was impassable due to flooding. Ingrum Decl. 5. According to Plaintiff, JTF-6's construction work rendered the area surrounding the southern portion of the River Road a virtual lake. *Id.* Although Plaintiff knew that the road was passable from the north, he never attempted to access the property from that direction. Ingrum Dep. at 27, 112-13. Plaintiff testified:

Q. Can you approach your property from the north?

A. Probably. But I never have.

Q. Why not?

A. Because it's much longer.

Q. Instead of going through Candelaria, then, if you're approaching from the north, what town would you go through?

A. I believe now that you would turn off at Valentine, which is a little town west of Marfa.

Q. Turning off of Route 90?

A. You-you-yes. You would take 90-you would take 90 west of Marfa. And about 20 or 30 miles, there's a little town called Valentine. And somewhere along in there, ... there would be a road that would go down to river-to the river road.

Id. at 27-28. Plaintiff continued:

Q. ... We talked about approaching your property from the north. You said there's a road from Valentine.

A. Somewhere around Valentine.

Q. Did you ever take that road?

A. I have not all the way. I've taken it partially. I've taken it from-from wherever that turnoff is. And I don't-frankly don't remember whether it's this side of Valentine or the other side. I've taken it down to the Rio Grande and went up the-or went down river a little bit. But I've never taken it all the way to the-to my property. But that's a long ways. That's a long, hard ride. I mean, you're talking about-anyway, it's a long hard drive to-to get that way.

....

Q. Was the river road passable from that direction? Or why did you turn-

A. Yeah. I just-it was such a long-you know, the road is so rough. And you're traveling so slow. You know, you're traveling maybe ten miles an hour. And what happened to me, and you hear that it happens to a lot of people, is they go down there

and they just get tired of-my God-my gosh, how much longer is this thing going to last. And they turn around and come back.

....

Q. So just to the clear, you didn't turn around because the road was impassable-

A. No. The road-the road was passable.

Id. at 112-13. Plaintiff estimated that accessing his property from the north "would have required an additional 7-9 hours of driving, which was an untenable option." Ingrum Decl. 5.

From 1999 to 2004, Plaintiff spoke with USBP agents on numerous occasions to determine if the southern entrance to the property was passable. Plaintiff was informed by the USBP on some occasions that the River Road was passable and that he could enter his property. Nonetheless, Plaintiff did not attempt to enter the property because it was not convenient for Plaintiff to make the drive from Austin, Texas.[3]

In May 2004, Plaintiff was informed of the existence of the gravel pit for the first time by a migrant worker named "Lupe" who had trespassed on his property to gain access to the Rio Grande River.

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[3] Plaintiff testified: "Although on some occasions it was reported to Mr. Ingrum that the road was passable, these were at times when it was not convenient for me to make the arduous drive." Ingrum Decl. 5.

Ingrum Dep. at 79. When Plaintiff met Lupe by chance on the street in the town of Candelaria, Lupe informed him that "those guys that worked on the road sure took a lot of material" from "the big gravel pit that they dug back in there." *Id.* at 81-82.

In January or February of 2005, Plaintiff entered the property and saw the gravel pit for the first time. Ingrum Dep. at 67.

Procedural Background

On August 2, 2006, Plaintiff filed his first complaint with this Court seeking compensation for Defendant's taking, but dismissed that action voluntarily.[4] *Ingrum v. United States*, No. 06-566L (Fed. Cl. Dec. 19, 2006). Plaintiff filed the instant Complaint on January 9, 2007, raising the same takings allegation as in his original Complaint. Defendant moved to dismiss the action as untimely filed under 28 U.S.C. § 2501. The Court denied Defendant's motion to dismiss without prejudice on June 26, 2007, because the record was not sufficiently developed on the issue of when Plaintiff first should have known that the fill material was removed from his property. *Ingrum v. United States*, 77 Fed. Cl. 248 (2007). After conducting discovery, Defendant filed a renewed motion to dismiss on January 25, 2008, again

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[4] Plaintiff dismissed his original Complaint to cure a potential jurisdictional problem arising under 28 U.S.C. § 1500, stemming from a suit Plaintiff filed in the United States District Court for the Western District of Texas against the United States on August 1, 2006.

claiming that this action was time-barred.[5] Oral argument on Defendant's renewed motion was held on April 2, 2008.

Discussion

Defendant seeks dismissal of this action claiming it is time-barred under the six-year statute of limitations governing actions in this Court, 28 U.S.C. § 2501. This statute of limitations "is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed." *MacLean v. United States*, 454 F.3d 1334, 1336 (Fed. Cir. 2006) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)); *see generally John R. Sand & Gravel Co. v. United States*, ---U.S. ----, ---- - ----, 128 S.Ct. 750, 753-54, 169 L.Ed.2d 591 (2008) (The six-year statute of limitations in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims.).

When reviewing a motion to dismiss for lack of subject-matter jurisdiction under RCFC 12(b)(1), the court must view all facts alleged in the complaint as favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A court may look to evidence outside the pleadings to determine the existence of subject-matter jurisdiction. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d

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[5] Briefing was completed on March 28, 2008. Plaintiff sought leave to file an un-sworn, undated statement of Atanacio Baeza and two unauthenticated and undated photographs to supplement his response to Defendant's motion to dismiss. The Court orally denied leave. Tr. (Apr. 2, 2008) at 5.

746, 747 (Fed.Cir.1988). Where, as here, the Court's subject-matter jurisdiction is put into question, Plain-tiff bears the burden of establishing subject-matter jurisdiction by a preponderance of the evidence. *Reynolds*, 846 F.2d at 748; *Patton v. United States*, 64 Fed.Cl. 768, 773 (2005).

28 U.S.C. § 2501 states that "every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. A takings claim accrues when all the events have occurred which fix the liability of the government and the plaintiff knew or should have known of the existence of such events. *John R. Sand & Gravel v. United States*, 457 F.3d 1345, 1355-56 (Fed.Cir.2006), aff'd, --- U.S. ----, 128 S.Ct. 750, 169 L.Ed.2d 591 (Jan. 8, 2008) (quoting *Goodrich v. United States*, 434 F.3d 1329, 1333 (Fed.Cir.2006) and citing *Hopland*, 855 F.2d at 1577).

Here, the parties agree that the taking occurred in April 1999, when the excavation of the pit was completed and the fill material removed. Plaintiff had no actual knowledge of the taking until he was advised of it by a trespassing migrant worker some five years later. Plaintiff claims he had no reason to know of the taking given his distance from the property. He asserts that he was not put on notice of potential injury because, in granting Defendant the Right of Entry to repair the River Road, he did not authorize Defendant to take the fill. *See* Tr. (Apr. 2, 2008) at 20.

Contrary to Plaintiff's position, longstanding precedent dictates that Plaintiff was on notice of a potential claim because he was aware that the

government was entering his property to repair the River Road and the government's actions in removing the fill were open and notorious. In *Coastal Petroleum Co. v. United States*, 228 Ct.Cl. 864, 1981 WL 21512 (1981), the Court of Claims found that the plaintiff was clearly "on inquiry as to the threat to its property rights" where the government was constructing a canal and allegedly effected a taking of the plaintiff's limestone. 228 Ct.Cl. at 867. Although the Coastal Petroleum plaintiff was ignorant of the injury to its mineral rights until some seven years after the taking, the Court held the action time-barred, finding that the plaintiff was "on inquiry as to its possible injury" where the government's actions were open and notorious. *Coastal Petroleum*, 228 Ct.Cl. at 867. The Court explained:

> Plaintiff alleges, however, that it was simply ignorant of the injury to its mineral rights until 1974, although it admits in its response to defendant's motion that it was aware that the Canal was being constructed. Where the actions of the government are open and notorious, we have pointed out that plaintiff is on inquiry as to its possible injury. *Kabua Kabua v. United States*, 212 Ct.Cl. 160, 164-65, 546 F.2d 381, 383 (1976), *cert. denied*, 434 U.S. 821, 98 S.Ct. 63, 54 L.Ed.2d 77 (1977). Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run. *Japanese War Notes*, 178 Ct.Cl. at 634, 373 F.2d at 359. Accord, *Braude v. United States*, 218 Ct.Cl. 270, 585 F.2d 1049 (1978). In the present case, plaintiff was a Florida corporation, with an office staffed by a high-ranking corporate officer in Tallahassee, Florida. The defendant has

> supplied numerous articles from state and national news media to show that the building of the Canal was indeed open and notorious. Plaintiff itself has admitted that it was aware of the construction of the Canal. These circumstances make it amply clear that plaintiff was on inquiry as to the threat to its property rights.
>
> *Id.*

Here, there is stronger reason than in *Coastal Petroleum*, to place Plaintiff "on inquiry." Plaintiff was clearly aware of the construction on his property as he signed the Right of Entry-personally acknowledging that the stretch of River Road on his property would be reconstructed by the government and granting it access to do the work. The government's reconstruction efforts and removal of Plaintiff's fill resulted in an enormous pit visible from the road traversing his property-unquestionably open and notorious. As such, Plaintiff was on inquiry of a potential claim in April 1999, when the fill material was removed, and the statute of limitations began to run at that time. *Id.*; *see also Catellus Development Corp. v. United States*, 31 Fed.Cl. 399, 406-07 (1994) (A takings claim based on a "physical invasion and consequent appropriation of property accrues at the time the invasion is obvious, ascertainable, and permanent.").

Despite the presence of the enormous pit on his property, Plaintiff contends that the alleged taking was "inherently unknowable," due to his inability to visit his property, apparently invoking the "accrual suspension" doctrine. In *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed.Cir.2003), the Federal Circuit

recognized that the accrual suspension rule may be applied to Section 2501. The *Martinez* Court explained:

> Martinez invokes authority from this court holding that the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. § 2501, until the claimant knew or should have known that the claim existed. That legal principle is well settled in our cases. *See, e.g., Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed.Cir.1994); *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1571-72 (Fed.Cir.1993); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed.Cir.1988); *Kinsey v. United States*, 852 F.2d 556, 557 n.* (Fed.Cir.1988); *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed.Cir.1985); *Giesler v. United States*, 230 Ct.Cl. 723, 725, 1982 U.S.Ct. Cl. Lexis 95 (1982). The government agrees with that legal rule, which is based on a construction of the term "accrues" in section 2501. That rule is distinct from the question whether equitable tolling is available under that statute, although the term "tolling" is sometimes used in describing the rule.

Martinez, 333 F.3d at 1319.[6]

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[6] Invoking "equitable tolling" as opposed to the "accrual suspension" rule is a distinction with a difference. In *John R. Sand & Gravel Co.*, 128 S.Ct. at 754, the Supreme Court recently suggested that because 28 U.S.C. § 2501 is jurisdictional the doctrine of equitable tolling may not be applied to this statute. The Court noted that jurisdictional statutes of limitation are "more absolute" and may "forbid [ ] a court to consider whether

As the *Martinez* Court noted, "[t]he 'accrual suspension' rule is 'strictly and narrowly applied: ... [plaintiff] must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was "inherently unknowable" at the accrual date.' " *Id.* (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed.Cir.1985)); *see also L-3 Communications Integrated Sys. v. United States*, 79 Fed.Cl. 453, 464 (2007) (finding "a classic case for application of the accrual suspension rule" in that Druyun, an agent of Defendant, "concealed her actions from the world," and stating "[i]t was not until Druyun's other procurement illegalities came to light that the [Inspector General] investigated this procurement, identified it as a candidate for potential wrongdoing by Druyun and prompted L-3 to suspect that something may have been amiss in the C-5 AMP procurement."). In *Japanese War Notes Claimants Association of Philippines v. United States*, 178 Ct.Cl. 630, 373 F.2d 356, 359 (1967), the Court recognized that a claim is "inherently unknowable" when there is nothing to alert one to the wrong at the time it occurs-such as when a fruit tree could not be determined to be

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certain equitable considerations warrant extending a limitations period." *Id.* at 754; Cf. *West Virginia Highlands Conservancy v. Johnson*, 540 F.Supp.2d 125, 141-42 (D.D.C.2008) (reading *John R. Sand & Gravel*, as precluding equitable tolling under § 2501 stating: "The Court [in *John R. Sand & Gravel*] reaffirmed that § 2501 is jurisdictional and that notions of equitable tolling do not apply to it."). In contrast, under *Martinez*, the accrual of a cause of action is suspended until the claimant knew or should have known of his claim.

the wrong variety at the time of delivery because that was not ascertainable until the tree bore fruit.

Here, there is no concealment or unascertainable condition warranting application of the accrual suspension doctrine. Rather, Plaintiff is deemed to have possessed knowledge of the excavation of fill material that "could have been discovered with the type of inquiry expected of a diligent property owner." *Catellus*, 31 Fed.Cl. at 408; *see LaFont v. United States*, 17 Cl.Ct. 837 (1989) (finding that taking claim accrued at the conclusion of obvious dredging operations and rejecting the plaintiff's assertion that the damage to plaintiff's oyster beds caused by the dredging was "inherently unknowable.").

The fact that Plaintiff lived approximately 10 hours away from the property and accessing the property was inconvenient due to the flooding of the south access road does not render his taking claim inherently unknowable. Whether Plaintiff should have known of his claim in April 1999 is determined under an objective standard, not based on Plaintiff's particular circumstances or notions of convenience. *Catellus*, 31 Fed.Cl. at 408. A property owner is charged with knowledge of what happens on his property even if the land is remote and difficult to access. *Id.* In *Catellus*, the plaintiff whose remote land was accessible only by helicopter or via a combination of off-road driving and hiking claimed it had no knowledge that the Marine Corps had for many years used its property to conduct live fire drills that contaminated the property. *Id.* at 400. The *Catellus* plaintiff alleged that its takings claim did not accrue until 1989 when it first learned of the Marine Corps' activities-even though the Marine Corps had been using the property for live fire training

since the 1950s. *Id.* at 407. Unpersuaded by difficulty the plaintiff had in accessing the remote property, the Court found that the plaintiff's claim could have been discovered with the type of inquiry expected of a diligent property owner. *Id.* at 408. Here, Plaintiff was capable of gaining entry into his property far more easily than the *Catellus* plaintiff-with an additional seven-to-nine hour drive-compelling the conclusion that Plaintiff's claim was discoverable with reasonable diligence. As such, Plaintiff has not established that the taking was inherently unknowable.

Conclusion

Plaintiff's claim accrued in April 1999, well over seven years before Plaintiff filed the instant action. As such, Plaintiff's action is time-barred under 28 U.S.C. § 2501, and Defendant's Renewed Motion to Dismiss is **GRANTED**. This action is dismissed for lack of jurisdiction.